LIBRARY SUPREME COURT, U. S.

No. 1500

Office-Supreme Court, U.S.
FILED
JUN 9 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

PIKES PEAK BROADCASTING COMPANY AND
SANGRE DE CRISTO BROADCASTING CORPORATION,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RICHARD HILDRETH
1225 Connecticut Avenue, N. W.
Washington, D.C. 20036

Attorney for Petitioner
Pikes Peak Broadcasting Company

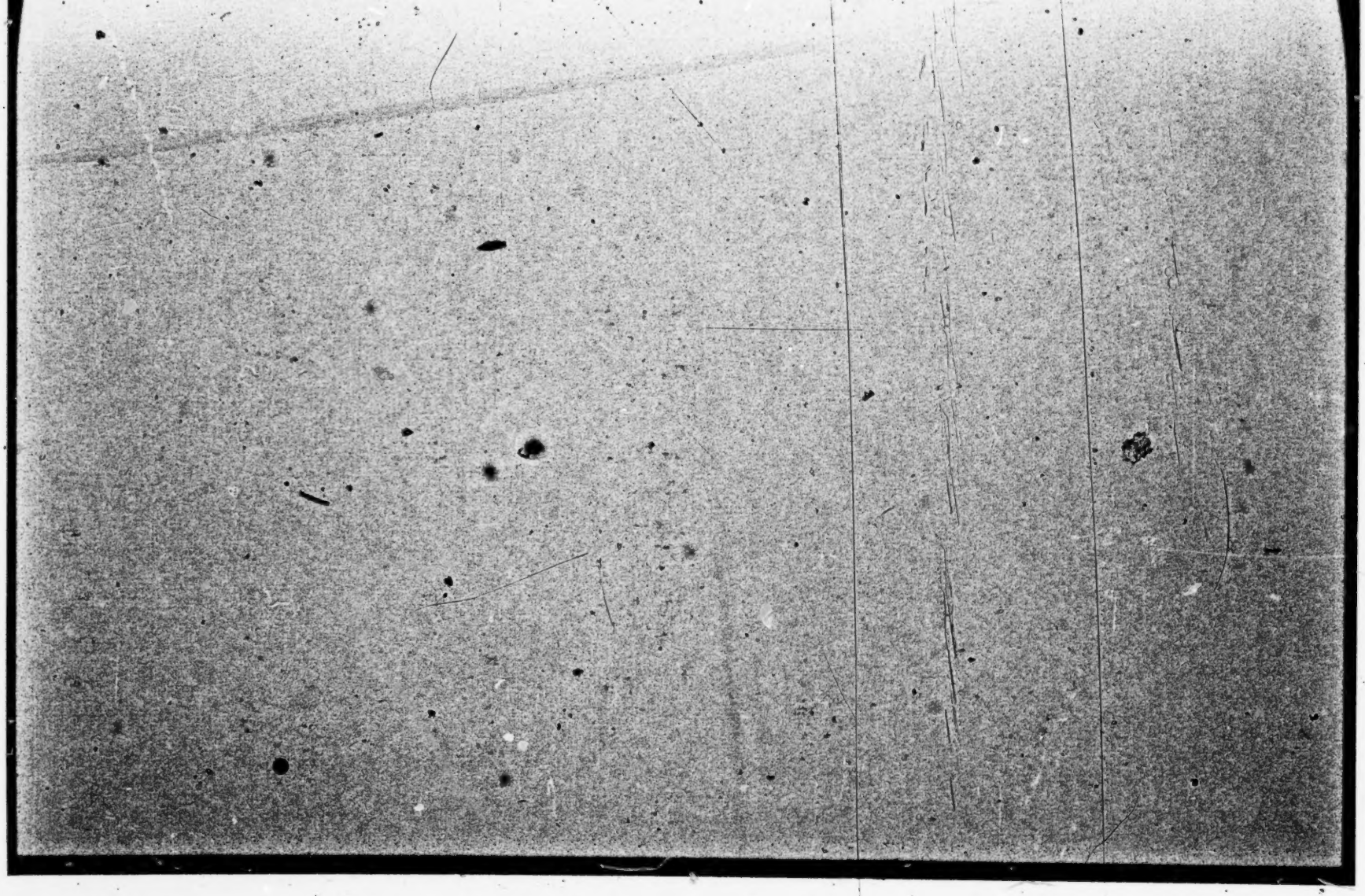
JAMES A. McKENNA
VERNON L. WILKINSON
ROBERT W. COLL
1705 DeSales Street, N. W.
Washington, D. C. 20036

Attorneys for Petitioner
Sangre De Cristo Broadcasting Corporation

Of Counsel:

FLETCHER, HEALD, ROWELL,
KENEHAN & HILDRETH
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

McKENNA & WILKINSON
1705 DeSales Street, N.W.
Washington, D. C. 20036



INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS	3
STATEMENT	3
REASON FOR GRANTING THE WRIT	8
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D. C. 346, 258 F.2d 440 (1958) 9

Cedar Rapids Television Co. v. FCC, 128 U.S. App. D. C. 270, 387 F.2d 228 (1967) . . 13, 15

Channel 9, Syracuse, Inc. v. FCC, 128 U.S. App. D. C. 187, 385 F.2d 969 (1967) 13

Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940) 14

Federal Communications Commission v. Sanders Bros., 309 U.S. 470 (1940) 8, 9, 15

Page

Hubbard Broadcasting, Inc. v. FCC,
128 U.S. App. D. C. 197, 385 F.2d
979 (1967) 13

Indiana Broadcasting Corp. v. FCC,
___ U.S. App. D. C. ___, 407 F.2d
681 (1968) 15

KGMO Radio Television v. Federal Communications Commission, 119 U.S. App. D. C. 1, 366 F.2d
920 (1964) 14

L. B. Wilson, Inc. v. Federal Communications Commission, 83 U.S. App. D. C. 176, 170
F.2d 793 (1947) 15

United States v. Carolina F. Carriers Corp.,
315 U.S. 475 (1942) 15

United States v. Southwestern Cable Co.,
392 U.S. 157 (1968) 8, 9, 10, 16

Statutes and Rules:

Communications Act of 1934, as amended,
Section 307(b) (47 USC §307(b)) 3, 5
Section 309(d) (47 USC §309(d)) 3, 14
Section 309(e) (47 USC §309(e)) 3, 14

Rules and Regulations of Federal Communications Commission,
Section 74.1105 (47 CFR §74.1105) 3, 11
Section 74.1105(c) (47 CFR §74.1105(c)) 8, 11
Section 74.1107 (47 CFR §74.1107) 3, 11, 12
Section 74.1109 (47 CFR §74.1109) 2, 3, 4, 8, 11
12, 13, 17
Section 74.1109(f) (47 CFR §74.1109(f)) 12

United States Judicial Code,
Section 1254(1) (28 USC §1254(1)) 2

Page

Administrative Agency Reports and Decisions:

Midwest Television Co., 15 FCC 2d 84 (1968) . . . 6
Midwest Television, Inc., 13 FCC 2d 478 (1968) . . 13
"Notice of Proposed Rule Making and Notice of Inquiry," 15 FCC 2d 417 (1968) 6, 7, 17

Order, released by Federal Communications Commission, January 17, 1969 (Docket No. 18397) Pike and Fischer Radio Regulations, "Current Service," Vol. 2; 34 F.R. 1177 (January 24, 1969) 17

Second Report and Order, 2 FCC 2d 725 (1966) 6, 10, 11, 12

IN THE

Supreme Court of the United States

October Term, 1968

No.

PIKES PEAK BROADCASTING COMPANY
AND SANGRE DE CRISTO BROADCASTING
CORPORATION,

Petitioners.

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Pikes Peak Broadcasting Company and Sangre De Cristo Broadcasting Corporation, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 24, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pages 1 to 25) is unreported. The Commission's Memorandum Opinion and Order, dated May 24, 1968, is reported at 12 FCC 2d 955 and reprinted in the Joint Appendix (J. A. 200-35 through 200-61).[1]

JURISDICTION

Judgment of affirmance was entered by the Court below on March 24, 1969. A motion for rehearing, and, alternatively, for rehearing in banc, was denied by order of May 2, 1969. The jurisdiction of this Court is invoked under 28. U S C § 1254(1).

QUESTIONS PRESENTED

1. Where the Federal Communications Commission, implementing its jurisdiction over CATV systems and acknowledging that substantial public interest questions can arise therefrom in the small television markets, adopts a rule (47 C F R § 1109) for determination of those questions on an *ad hoc* basis, may it deny, without hearing, substantial and timely petitions as "insufficient" without having established any standards of "sufficiency," *i.e.* the burden of production necessary to justify a hearing and the sort of information relevant in meeting that burden.

2. Whether the Court of Appeals was bound, in any event, to require the Commission to consider the applicability of regulations adopted subsequent to the Commission decision herein (but prior to that of the Court of Appeals) which reflect the agency's most recent expert public interest determinations concerning CATV operations in the small television markets.

---

[1] "J.A." refers to the printed Joint Appendix in the Court below, duly certified to this Court.

STATUTES AND REGULATIONS

1. Pertinent to the Court's consideration of this case are Sections 307(b), 309(d) and 309(e) of the Communications Act of 1934, as amended (47 U S C § § 307(b) 309(d) and 309(e)), which are reprinted in Appendix B.

2. The pertinent regulations of the Federal Communications Commission are § § 74.1105, 74.1107 and 74.1109 (47 C F R § § 74.1105, 74.1107 and 74.1109), which are reprinted in Appendix C.

STATEMENT

Colorado Springs-Pueblo, Colorado, ranks 138 of the nation's 224 television markets. Its three operating VHF stations are each affiliated with a national television network. In addition, the market has a VHF educational channel applied for and three commercial UHF channel allocations as yet unapplied for. Its three stations serve, in addition to the two core cities, substantial rural populations in rugged mountainous terrain (frequently via translators) who are solely dependent upon the Colorado Springs-Pueblo stations for television service. However, it is the residents of the two core cities which represent the principal viewing (and, therefore, economic) base for the operation of the local stations.[2]

Vumore Video Corporation of Colorado, Inc., ("Vumore") gave notice[3] that it intended to operate a CATV system in Colorado Springs carrying, in addition to the three local stations, five Denver VHF stations which cannot now be viewed in Colorado Springs-

---

[2] 61% of the persons who view the three local stations reside in El Paso and Pueblo counties in which Colorado Springs and Pueblo are located. 70% of the population of these two counties resides in their two core cities (J.A. 221).

[3] 47 C F R §1105.

Pueblo.[4] Three of these are affiliated with the national networks; a fourth is an independent station controlled by the Chicago Tribune; the fifth is Denver's educational station.

The Vumore system is designed for a capacity of twenty television channels plus fifteen FM signals. Vumore, in what it termed "phase II" of the CATV operation, committed itself to carriage of at least ten more television broadcast signals (plus fifteen FM signals) including additional Denver independent stations and independents from Los Angeles and San Francisco. It proposes, as well, at least four channels of originations to fill out its twenty-channel capacity.

Following procedures prescribed by the Commission,[5] petitioners, as licensees of television stations KRDO-TV, Colorado Springs, and KOAA-TV, Pueblo[6], filed timely objections to the proposed CATV services and submitted extensive economic studies in support thereof.[7] These

---

[4] See App. A, p. 6, fn. 5.

[5] 47 C F R §1109.

[6] The market's third station, KKTV, Colorado Springs, (Garvey Communications, Inc.) intervened in the Court below supporting the petitioners.

[7] Petitioners did not object to carriage of the Denver educational station until such time as the local educational station is able to go on the air. Subsequent to the Vumore notice for Colorado Springs, Pueblo TV Power, Inc., (an intervenor below) gave notice that it would operate a CATV system in Pueblo to provide the same services on its twenty-channel system. Timely objections were made with respect thereto. The Commission refused petitioners' request to consolidate the two proposals and, apparently for reasons of its own administrative convenience, acted upon the Colorado Springs proposal alone. It has not yet acted on the Pueblo proposal.

studies pointed out that the introduction of the Denver stations (from the nation's 39th market) into the small Colorado Springs-Pueblo market: (1) would reduce, perhaps eliminate, the ability of the stations to continue to produce local and public service programming and local news now carried at substantial loss; (2) could result in a merger of the Denver and Colorado Springs-Pueblo television markets whereby advertisers and networks could reach *most of* the smaller market (but not the rural areas) through carriage of the Denver outlets via CATV, thus threatening the existence of one or more of the local stations; and (3) would certainly foreclose the development of any additional local stations on the UHF channels allocated by the Commission to Colorado Springs-Pueblo pursuant to Section 307(b) of the Act. In addition, it was pointed out that the CATV entrepreneur had announced extensive plans for program originations, thus providing, with television broadcast signals as the base, additional competition destructive of local services and a form of pay television. The same entrepreneur (controlled by RKO General), it was shown, has extensive CATV holdings throughout the region (looking toward service to 750,000 people) as well as extensive broadcast and CATV holdings nationally, thus providing a realistic financial base for pay television and presenting serious questions of concentration of control of media of mass communications, regionally and nationally.

Petitioners, therefore, asked the Commission to conduct a hearing, and to make public interest findings as to the effects of these CATV services upon local broadcast services, upon the development of additional local UHF services and upon Commission and Congressional policies relative to pay television and diversification of media of mass communications.

With one of its seven members absent, a divided Com-

mission (4-2) declined to do so.[8] A divided panel of the Court of Appeals (Chief Judge Bazelon, concurring in part and dissenting in part) affirmed. Despite "certain defects" in the Commission's opinion (App. A, p. 3), the Court held: "It is important to emphasize, and *perhaps decisive*,[9] that the Commission's judgment on all of these economic forecasts is a provisional one. . . ." (App. A, p. 13)

The Court stated that the Commission's authority "must include the power to correct *false starts* and to cut back CATV operations if more experience shows *that this policy best serves the public interest.*" (App. A, p. 14) The statutory or regulatory basis for such authority is not mentioned.[10]

After the case had been submitted to the Court of Appeals (but before its decision), the Commission, acting upon "more experience," proposed significant modifications in its CATV regulations,[11] which, as here perti-

---

[8] Only two Commissioners adopted the Commission's opinion; the other two members of the majority "concurred in the result." Two Commissioners voted for an evidentiary hearing with Commissioner Cox issuing a dissenting opinion.

[9] Emphasis supplied throughout unless otherwise indicated.

[10] The assumption of the Court of Appeals that service, once instituted, can be terminated is contrary to the Commission's own policy determination: "Once entrenched, it is difficult, if not wholly impracticable in light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest." *Second Report and Order*, 2 FCC 2d 725, 782 (1966), *Midwest Television Co.*, 15 FCC 2d 84 (1968).

[11] "Notice of Proposed Rule Making and Notice of Inquiry," 15 FCC 2d 417 (December 13, 1968). A copy of this Notice was filed with the Court by the Commission.

nent, would limit, without "retransmission consent," CATV systems in the smaller television markets to the carriage of three network stations, one independent and one educational station. Thus, if this subsequent public interest determination were applicable, Vumore could here carry only the Denver independent and educational stations plus the three Colorado Springs-Pueblo stations[12] – a result which petitioners made clear below[13] was satisfactory to them.

However, the Commission held, in thus modifying its approach to CATV regulation and contrary to the understanding of the Chief Judge below,[14] that it intended to "grandfather" all systems *authorized* prior to December 20, 1968, even though, as in Vumore's case, they were not, by that date, *operating.*[15]

---

[12] While the December 13 Notice speaks in terms of predicted service and while the Denver stations place theoretical Grade B signals over Colorado Springs (but not Pueblo), the Court of Appeals held that the Denver signals are not actually viewable in Colorado Springs (App. A, p. 6, fn. 5). For purposes of the December 13 Notice, therefore, they are the same as "distant" signals.

[13] "Petition for Rehearing and Alternatively for Rehearing in Banc," April 7, 1969, p. 10.

[14] In concurring in part, the Chief Judge assumed these new standards would apply (App. A, p. 23) while the majority intimated no opinion on the question (App. A, p. 17, fn. 11). However, as pointed out by petitioners in seeking rehearing, the Commission's December 13 Notice makes clear that *the date of Vumore's authorization* (prior to December 20 albeit stayed by Court action) is crucial. See 15 FCC 2d at 438; para. 53; final sentence thereof.

[15] Throughout these proceedings, in recognition of the impracticality of rolling back services once instituted, Vumore has not been permitted to operate. Under Commission procedures, the (Cont'd)

Thus, absent relief, Vumore will be permitted to carry the five Denver stations, giving Colorado Springs more service than Denver itself, whereas the Pueblo system (with no color of authorization prior to December 20) will be limited by the December 13 action to carriage of only the Denver independent and educational stations.[16]

REASONS FOR GRANTING THE WRIT

I

This case presents important issues of substance and procedure under the Communications Act of 1934, as amended[17] and under the decisions of this Court in *Federal Communications Commission v. Sanders Bros,* 309 U.S. 470 (1940) and *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

"An important element of public interest and convenience affecting the issue of a license is the ability of the licensee *to render the best practicable service* to the community reached by his broadcasts." *Federal Communications Commission v. Sanders, Bros., supra* at 475. While this Court there made clear that financial loss to a

---

[15] (Cont'd)
timely filing of objections under 47 CFR §74.1109 automatically stays a system's right to operate (47 CFR §74.1105(c)). Upon appeal of the Commission's decision, the Court below entered a judicial stay and has now ordered stay of its mandate pending filing of this petition.

[16] The Pueblo system, relying upon the decision of the Court below, is now urging the Commission to waive the December 13 determination and permit it to carry the same signals as Colorado Springs.

[17] 47 USC §151 *et seq.*

licensee is not, *per se*, a public interest concern, competition is a relevant factor to Commission responsibilities for:[18]

> "It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations – the existing and the proposed – will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that by a division of the field, both stations will be compelled to render inadequate service."

As this Court pointed out in *United States v. Southwestern Cable Co., supra* at 173 (footnote 38):

> " 'Congress and the people' have no particular interest in the success of any given broadcaster, *but if the failure of a station 'leaves the community with inferior service,' this becomes 'a matter of real and immediate public concern.'* "

As restated by the United States Court of Appeals for the District of Columbia Circuit,[19] following *Sanders Bros.*, "the question whether a station makes $5,000 or $10,000 or $50,000 is a matter in which the public has no interest *so long as service is not adversely affected* . . ." But:[20]

> ". . . When an existing licensee offers to prove that the economic effect of another station would be

---

[18] *Federal Communications Commission v. Sanders Bros., supra* at 476.

[19] *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D. C. 346, 349, 258 F. 2d 440, 443 (1958).

[20] *Ibid.*

> *detrimental to the public interest,* the Commission should afford *an opportunity for presentation of such proof. . . .*"

It was, precisely, the potentially destructive effect *upon broadcast services* and, particularly, *local services* which led the Commission to assert jurisdiction over all CATV systems[21] and which led this Court to affirm that action.[22] As this Court noted:[23]

> "The Commission has been charged with broad responsibilities for the orderly development of an appropriate system *of local television broadcasting.* The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the nation's population."

The Court concluded that the Commission was correct in determining "that the likelihood or probability of [CATV's] adverse impact upon potential and existing service has become too substantial to be dismissed."[24] The Court noted that among the Commission's *statutory obligations,* were the "creation of a system of local broadcasting stations" and the promotion of "significantly wider use . . . of the available ultra-high frequency channels [footnote omitted]."[25] Thus, the Court concluded that, while it was not then passing upon the validity of specific rules promulgated,[26] "the successful

---

[21] *Second Report and Order, supra.*

[22] *United States v. Southwestern Cable Co., supra.*

[23] *Id.* at 177.

[24] *Id.* at 165.

[25] *Id.* at 174.

[26] *Id.* at 167.

performance of these duties demands *prompt and efficacious regulation* of community antenna television systems."[27]

In proceeding to regulate, the Commission established a procedural dichotomy: in the top 100 markets, it ordered that an evidentiary hearing would be *mandatory* to permit public interest findings on the effect of importing "distant" signals via CATV (47 CFR §74.1107). In the smaller markets, the Commission established procedures whereby stations would be notified of proposed CATV services (47 CFR §74.1105) and afforded the opportunity to bring public interest questions arising therefrom to the Commission's attention (47 CFR §74.1109) with an automatic stay being imposed upon the CATV operation pending Commission review (47 CFR §74.1105(c)).

The nation's top 100 television markets contain about 90% of the country's television homes.[28] Thus, the mandatory hearing procedure of 47 CFR 74.1107, which is applicable thereto, immediately saved the largest broadcasters and the networks from uncontrolled CATV intrusion. Some 241 television stations in 124 television markets below the top 100, competing, among them, for 10% of the national audience, were promised, as their single remedy, *ad hoc* scrutiny of CATV proposals as they arose.

Contrary to implications in the majority decision of the panel below,[29] the Commission did not make a finding in its *Second Report and Order* that CATV

---

[27] *Id.* at 177.

[28] *Second Report and Order, supra* at 783.

[29] App. A, pp. 6, 8, 13, 17, 18.

operations in the smaller markets *were necessarily in the public interest,* but rather there acknowledged:[30]

> "We think, therefore, that a fair compromise is to draw the line as to special attention . . . at the 100th market, and below that point, simply to take *such action as may be necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention.*"

The Commission elaborated:[31]

> "Admittedly, *there can be substantial problems affecting the public interest* where the CATV system proposes to extend the signals of broadcast stations beyond the Grade B contour *into areas below the top 100 markets.*"

A majority of the Court below, ignoring these Commission findings, proceeded upon the erroneous assumption that CATV operations in the smaller markets were presumptively in the public interest and that petitioners were therefore seeking a "waiver" of that presumption. No such finding has ever been made by the Commission, and no such presumption exists.[32]

---

[30] *Second Report and Order, supra,* at 783-4.

[31] *Id.* at 783.

[32] The title of 47 CFR §74.1109 must be read in its entirety. While it allows the filing of "petitions for waiver of the rules," such would normally come from CATV systems seeking relief, for example, from the mandatory hearing requirement of 47 CFR §74.1107. But 47 CFR §74.1109 also specifies procedures for rulings on "complaints and disputes" and 47 CFR §74.1109(f), following the Commission's *Second Report and Order* observations on small market problems, explicitly envisions evidentiary hearings.

As the Commission explained, the only difference between the top 100 and small market procedures is in the terms of burden of proof and proceeding:[33]

> "The *sole difference* is that the burden of proceeding and of proof lies on the CATV system in the case of distant signal proceedings under Section 74.1107(b) [the top 100 rule] and is *largely* on the petitioning broadcaster in a footnote 69 proceeding arising under Section 74.1107(d) and Section 74.1109 . . ." [the small market rule].

Differing divisions of the Court of Appeals below, considering specific actions by the Commission under these rules *on three different occasions*, warned that those actions were not readily comprehensible in light of overall Commission responsibilities and called for clarification of procedure and purpose.[34] Speaking directly to the absence of guidance for those attempting to invoke the procedures of 47 CFR §74.1109, a different division of the Court below held that, in the future, the Commission would be required "to make clear . . . the burden of proof it expects petitioners seeking an evidentiary hearing to meet."[35]

The threshold showing submitted by these petitioners "is the most substantial showing ever made in a case of this kind. . . . It stands substantially unimpaired despite

---

[33] *Midwest Television, Inc.*, 13 FCC 2d 478, 489 (1968).

[34] *Channel 9 Syracuse, Inc. v. FCC*, 128 U. S. App. D. C. 187, 385 F. 2d 969 (1967); *Hubbard Broadcasting, Inc. v. FCC*, 128 U.S. App. D. C. 197, 385 F. 2d 979 (1967); and *Cedar Rapids Television Co. v. FCC*, 128 U.S. App. D. C. 270, 387 F.2d 228 (1967).

[35] *Cedar Rapids Television Co. v. FCC, supra* at 274, 232.

the majority's uncritical acceptance of the staff's efforts to undermine it."[36]

That observation was not denied by the Court below. But the majority would affirm, ignoring the strictures of other divisions of its Court and without insisting upon clarification of applicable standards, upon the premise that the Commission, with "more experience," retains the power to correct "false starts."

Having assumed CATV jurisdiction, it is incumbent upon the Commission to establish procedures that are not only commensurate with its responsibilities, but with due process as well. The establishment of procedures to ascertain the public interest is left to the Commission only so long as it observes the basic requirements designed for the protection of public interests. The statute under which the Commission operates prescribes fundamentals of fair play and requires that interested parties be afforded a *realistic opportunity for a hearing. Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).[37]

Where there is a threshold question of the need for hearings, there is also a requirement that the standards for a hearing be *clearly established, KGMO Radio-Television, Inc. v. Federal Communications Commission,* 119 U.S. App. D.C. 1, 366 F.2d 920 (1964), particularly where, as here, the Commission is entering into a new

---

[36] Commissioner Cox, dissenting herein (J.A. 200-60, 61.)

[37] Petitioners here were never given the opportunity to respond to the Commission's *ex parte* disposition of their allegations and factual submissions in spite of the Commission's acknowledgment that the objections which it had to petitioners' submissions had not been previously articulated. (J.A. 200-41) Moreover, it is plain from the Act that the Congress intended to require the Commission to resolve "substantial and material questions of fact" through evidentiary hearing (47 USC §§309(d) and (e)).

field of regulation, *Cedar Rapids Television Co. v. Federal Communications Commission, supra.* Failure to establish clear standards results in a deprivation of due process. *L. B. Wilson, Inc. v. Federal Communications Commission,* 83 U.S. App. D.C. 176, 170 F. 2d 793 (1947).

Thus, whether the Commission may have given *some reasons* for denying petitioners' requests is not the question. Rather, it is whether petitioners have been deprived of due process by the Commission's failure to articulate the standards it expects petitioners to meet in demonstrating threshold or *prima facie* injury to the public interest.

Contrary to the majority opinion below the question is not whether, in this case, some sort of "path . . . followed [by the Commission] *can be discerned.*"[38] For, if necessary public interest inquiries are "halted at the threshold [so] that it is impossible to say whether or not . . . [statutory] standards have been applied, then . . . review has indeed become a perfunctory process."[39]

The proper question in CATV regulation, as recognized by another division of the Court below, is "whether what the Commission has done accords with entrenched standards by which administrative action is tested judicially."[40]

The result here is plainly inconsistent with the Commission's fundamental responsibilities as defined by this Court in 1940 (*Sanders Bros.*) and spelled out, again by

---

[38] App. A, p. 17.

[39] *United States v. Carolina F. Carriers Corp.*, 315 U.S. 475, 489 (1942).

[40] *Indiana Broadcasting Corp. v. FCC*, ___ U.S. App. D.C. ___, 407 F. 2d 681, 692 (1968).

this Court, in 1968 (*Southwestern*). It leaves the fate of the small market television industry, and, more importantly, the public they serve, to agency actions which can be neither rationally reviewed nor judicially tested.

As observed by Chief Judge Bazelon (App. A, p. 20), "the decisions of the Commission in this area suggest that this may indeed be the intended message [*i.e.* that no relief will ever be accorded small market TV] – with the caveat that the FCC retains the right to grant a hearing when it pleases and for whatever unannounced reasons it pleases."

The lack of meaningful procedures cannot be reconciled with this Court's definition of the Commission's statutory responsibility to consider the effect, and make public interest findings on, its own actions where the public interest is threatened. Neither can the result be squared with "prompt and efficacious regulation" of CATV services envisioned by this Court in *Southwestern* a year ago.

II.

If, however, the Commission is to be permitted to proceed without definition of the standards necessary to invoke its processes on the premise that, as it accumulates "more experience," it will have the ability to correct what the Court below termed "false starts,"[41] then, surely, when it does make further and corrective public interest findings, those determinations must be made applicable to relevant CATV operations.

After this case was submitted to the Court below, the Commission, based upon experience accumulated since

---

[41] App. A, p. 14.

1966, established new and different substantive procedures to govern the carriage of distant signals in small television markets.[42] In that action, while retaining the availability of the *ad hoc* procedures of 47 CFR §74.1109 for use by small market television stations seeking relief, the Commission also affirmatively determined that the public interest would be served by *limiting* CATV systems in markets below 100 to the carriage of stations providing the full services of the three television networks, one independent and one educational station without "retransmission consent." Under these substantive rules (made effective, as well, as interim guides), a system would be allowed to carry "distant" signals only to the extent that local stations *did not provide the specified services.* Since the local stations in Colorado Springs-Pueblo provide the full services of the three television networks, the Colorado Springs CATV system, in light of this public interest determination, should be limited to carriage of the Denver independent and educational stations plus the three Colorado Springs-Pueblo stations.

While the system could carry additional signals with "retransmission consent," the Commission made clear[43] that such consent would have to comprehend *ultimate programming rights.* Thus, the system would be required to bargain and pay for—as broadcast stations now do—

---

[42] "Notice of Proposed Rule Making and Notice of Inquiry," 15 FCC 2d 417 (1968). We emphasize that 47 CFR §74.1109 was retained, without change, and the need for meaningful standards thereunder remains, under the new rules, as urgent as under the old.

[43] Order released January 17, 1969, in Docket No. 18397, ¶4 (FCC 69-54); not officially reported but reprinted in Pike and Fischer, *Radio Regulation,* "Current Service," Vol. 2, pp. cxxiv–cxxiv-a, and published, 34 F. R. 1177 (January 24, 1969).

the rights to carry any programming additional to that available from the permissible stations.

Petitioners made clear to the Court below that if this intervening public interest accommodation were made applicable to Colorado Springs (as it will be in Pueblo)—if, indeed, as envisioned by the Court below, the Commission would thus correct its "false start"—petitioners were satisfied that the major public interest problems arising from the earlier proposal had been obviated.

Thus, although the Court of Appeals found it "perhaps decisive" that the Commission could and should correct "false starts" in this emerging and rapidly developing field, *the Commission has not shown any inclination to do so.* Nor did the Court below *insist that it do so.*

Small market television stations, if this decision is permitted to stand, have no meaningful remedy on an *ad hoc* basis; nor, apparently, is the public in these areas to be benefited by subsequent rule making findings by the Commission.

In short, application to this case of the most recent public interest determinations dealing with smaller television markets will not be made absent relief from this Court.

CONCLUSION

To insure achievement of "prompt and efficacious" regulation of CATV services, the petition for writ of certiorari should be granted.

Alternatively, this Court should vacate the judgment of the Court of Appeals and remand the case for appropriate further consideration in light of the Commission's

current, applicable public interest findings in respect to CATV services appropriate for the nation's small television markets.

Respectfully submitted,

RICHARD HILDRETH

Attorney for Petitioner
Pikes Peak Broadcasting Company

JAMES A. McKENNA
VERNON L. WILKINSON
ROBERT W. COLL

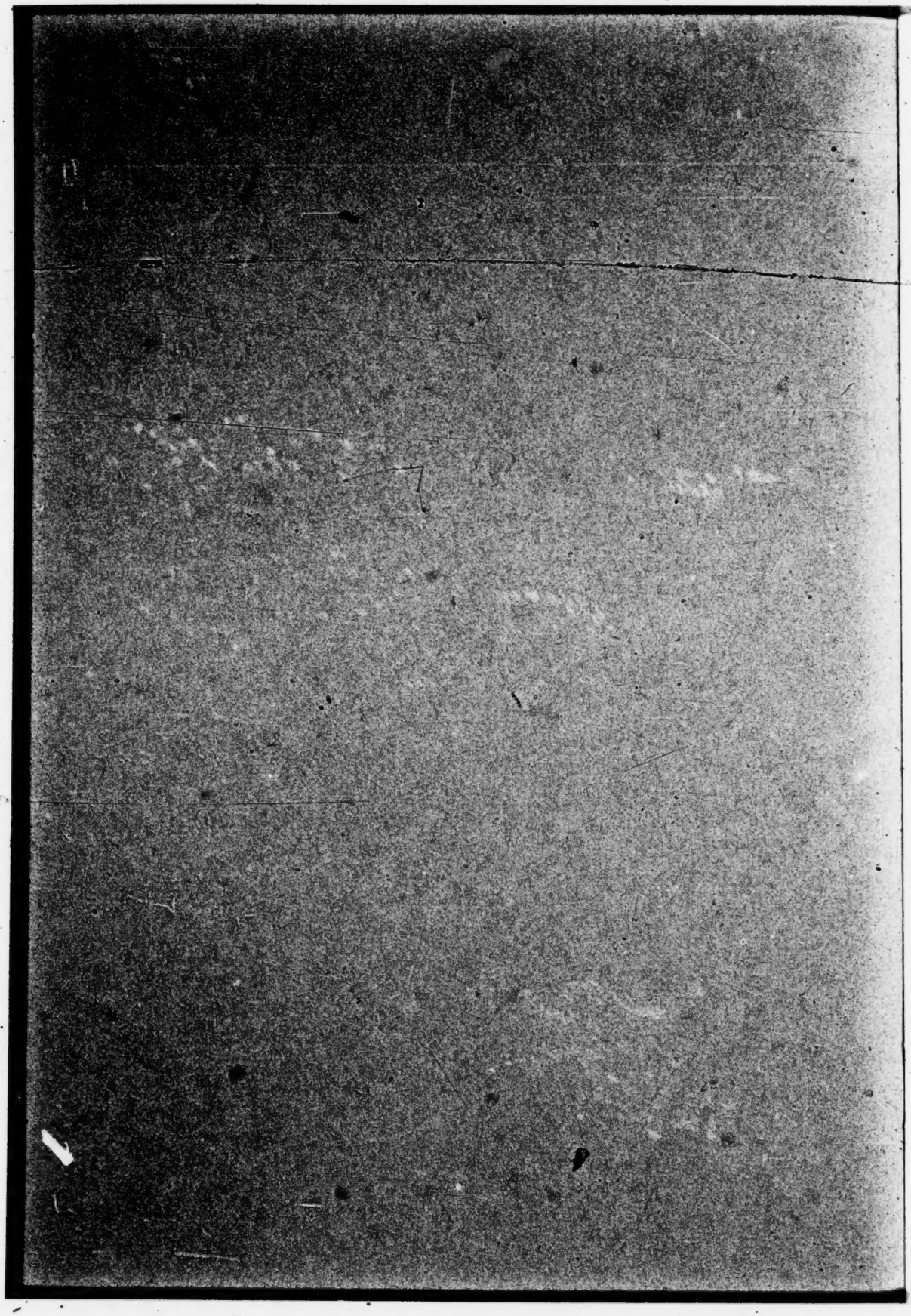
Attorneys for Petitioner
Sangre de Cristo Broadcasting Corporation

Of Counsel:

FLETCHER, HEALD, ROWELL, KENEHAN & HILDRETH
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036

McKENNA & WILKINSON
1705 DeSales Street, N.W.
Washington, D.C. 20036

June 9, 1969



APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,023

PIKES PEAK BROADCASTING COMPANY, Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents

CITY OF COLORADO SPRINGS, COLORADO, VUMORE VIDEO CORP. OF COLORADO, INC., GARVEY COMMUNICATIONS SYSTEMS, INC. NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL TV TRANSLATOR ASSOCIATION, COLORADO TRANSLATOR ASSOCIATION, ALL-CHANNEL TELEVISION SOCIETY, Intervenors

---

No. 22,024

SANGRE DE CRISTO BROADCASTING CORPORATION, Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents

GARVEY COMMUNICATIONS SYSTEMS, INC., NATIONAL ASSOCIATION OF BROADCASTERS, VUMORE VIDEO CORP. OF COLORADO, INC., CITY OF COLORADO SPRINGS, COLORADO, NATIONAL TV TRANSLATOR ASSOCIATION, COLORADO TRANSLATOR ASSOCIATION, ALL-CHANNEL TELEVISION SOCIETY, PUEBLO TV POWER, Intervenors

---

Petitions for Review of an Order of the Federal Communications Commission

---

Decided March 24, 1969

Mr. Richard Hildreth, with whom *Mr. Wade H. Hargrove* was on the brief, for petitioner in No. 22,023.

Mr. Robert W. Coll, with whom *Messrs. James A. McKenna, Jr.*, *Vernon L. Wilkinson* and *Carl R. Ramey* were on the brief, for petitioner in No. 22,024.

Mr. John H. Conlin, Associate General Counsel, with whom *Messrs. Henry Geller*, General Counsel, *William L. Fishman*, Counsel, Federal Communications Commission, and *Howard E. Shapiro*, Attorney, Department of Justice, were on the brief, for respondents. *Mrs. Lenore G. Ehrig*, Counsel, Federal Communications Commission, also entered an appearance for respondents.

Mr. Frederick T. Henry, with whom *Mr. C. Sherfy Jones* was on the brief, for intervenors, City of Colorado Springs, Colorado.

Mr. Alan Raywid, with whom *Messrs. John P. Cole, Jr.*, and *Roger E. Zylstra* were on the brief, for intervenor, Vumore Video Corp. of Colorado, Inc.

Mr. John B. Summers was on the brief for intervenor, National Association of Broadcasters.

Mr. Arthur Stambler was on the brief for intervenors, National TV Translator Association and Colorado Translator Association.

Messrs. Martin E. Firestone and *Michael Finkelstein* were on the brief for intervenor, All-Channel Television Society.

Messrs. Lee G. Lovett and *Joseph F. Hennessey* were on the brief for intervenor, Pueblo TV Power, Inc.

Mr. Howard F. Roycroft entered an appearance for intervenor, Garvey Communications Systems, Inc.

Before BAZELON, *Chief Judge*, TAMM and LEVENTHAL, *Circuit Judges*.

LEVENTHAL, *Circuit Judge*: Licensees of Colorado television stations in Colorado Springs (KRDO-TV) and Pueblo (KOAA-TV) have petitioned for review of an order of the

Federal Communications Commission authorizing Vumore Video Corporation of Colorado to commence operation of a community antenna television (CATV) system in Colorado Springs.[1] Vumore and other interested parties have intervened in these proceedings.[2] Despite certain defects in its opinion, we think the Commission's decision is supported by the record and should be affirmed.

The basic question presented by these petitions before the Commission was whether Vumore's proposed CATV

[1]Petitioners are Pikes Peak Broadcasting Company, licensee of Station KRDO-TV in Colorado Springs; Metropolitan Television Company, former licensee of Station KOAA-TV in Pueblo, Colorado; and Sangre de Cristo Broadcasting Corporation, Metropolitan's assignee. They petition under 47 U.S.C. § 402(a) for review of the Commission's decision and order in *Vumore Video Corp. of Colorado, Inc.*, 12 F.C.C.2d 955 (May 24, 1968).

[2]The City of Colorado Springs joined in Vumore's brief for affirmance of the Commission's decision. A separate brief for affirmance was filed by Pueblo T.V. Power, Inc., authorized to operate a CATV system in Pueblo. A joint brief for reversal was filed by the National Association of Broadcasters, the National TV Translator Association, the Colorado Translator Association, and the All-Channel Television Society. Garvey Communications Systems, Inc., licensee of Station KKTV-TV, Colorado Springs, filed a separate statement in support of the petitioners.

The Commission denied several requests to consolidate this proceeding with several other pending CATV proposals which would affect Denver and Pueblo. It denied the Denver request, stating that its policy was not to include petitions from smaller market stations with mandatory major market hearings. The microwave and CATV authorizations involving Pueblo were said to be at an early stage in the proceedings, and the Commission chose not to deny Vumore its right to expeditious consideration of its long pending notification. 47 C.F.R. 74.1109(f) (1968). The Commission further stated that much of the information submitted and examined in this proceeding related to both Colorado Springs and Pueblo. We note that the Coe-Saunders Report is a study of the Colorado Springs-Pueblo market and its conclusions apply to both cities. While the cumulative impact of multiple CATV operations in an area may in some cases call for consolidated proceedings, we think that the Commission has broad discretion to structure its own proceedings and gave adequate reasons for denying the requests for consolidation here.

service,[3] particularly the importation of Denver signals, posed a sufficient threat to the economic health of existing television stations or to potential development of UHF broadcasting in the Colorado Springs-Pueblo market to warrant or require holding an evidentiary hearing on those issues. Petitioners also requested that the issues of concentration of control of communications media and Vumore's plans for pay-TV be set for hearing. Petitioners claim error in the Commission's grant of authority in the absence of any such evidentiary hearing.

The Commission's response must be considered in the context of its broad regulatory program for CATV. The potentially injurious impact of CATV on the free television system through fragmenting audiences and revenues prompted the Commission's assertion of jurisdiction over cable as well as microwave CATV operations in its *Second Report and Order*, 2 F.C.C.2d 725 (1966), issued after extensive rule-making proceedings. In its decision affirming the Commission's jurisdiction, the Supreme Court agreed that prompt and effective regulation of CATV is a necessary correlative of the Commission's ". . . broad responsibilities for the orderly development of an appropriate system of local television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). See also *Buckeye Cablevision, Inc. v. FCC*, 128 U.S.App.D.C. 262, 387 F.2d 220 (1967).

---

[3]On August 16, 1967, Vumore gave notice pursuant to 47 C.F.R. 74.1105 (1968) of its intention to establish a CATV system in Colorado Springs. Its proposed service includes carriage of two Colorado Springs stations, one Pueblo station, three Denver commercial stations with network affiliation, one Denver independent station, one Denver educational channel, and two channels of news, weather, and music selected from area FM radio stations. Petitioners objected only to the carriage of the Denver stations proposed in the notice, except for the educational channel. They acquiesce in the carriage of the Denver educational channel only until the Pueblo educational channel becomes operative.

The Commission determined in the *Second Report* that CATV did not pose the same threat to free television in all markets. Specifically, it decided that independent UHF stations or wire pay-TV based upon CATV operations are most likely to develop in the top 100 markets, and that, accordingly, further audience fragmentation in those markets through competition from outside stations could have serious consequences.

In the smaller markets, below top 100, the Commission judged that independent VHF or UHF stations are less likely to develop. Smaller markets are likely to be underserved, and there CATV will make a positive contribution by bringing in independent (non-network) programming not otherwise available.

The Commission also observed that smaller markets are likely to contain three or fewer network-affiliated stations. The significance of network affiliation lies in the fact that the Commission's carriage and non-duplication rules, requiring CATV carriage of local stations and providing substantial exclusivity for local network programming, will protect the local stations' audience for network programs and revenues from network sources, thus insuring the stations' continued viability. *Second Report and Order, supra* at 783.[4]

The Commission's applicable rules governing hearings on proposed CATV operations—as in effect at the time of this proceeding—reflect these judgments concerning the differences between major and smaller markets. CATV systems

---

[4]The carriage and non-duplication rules were imposed upon CATV systems using microwave facilities in the *First Report and Order*, 30 F.C.C. 683 (1965). These rules were modified and extended to non-microwave CATV operations in the *Second Report and Order, supra*. The carriage rules require a CATV system to carry the signals of stations serving the community in which the system operates. The non-duplication rules prohibit CATV systems from duplicating the programs of the local stations on the same day. The effect of these rules is to maintain the local stations as exclusive outlets for most of their network programming.

proposing to operate within the Grade A contour of a television station located in a top 100 market cannot import distant signals[5] until the Commission makes a positive determination that importation of distant signals will be consistent with the public interest. 47 C.F.R. 74.1107(a) (1968). In general the rule contemplates that such determination for the top 100 markets will be made only after evidentiary hearing, though there is provision for waiver of hearing on appropriate petition. 47 C.F.R. 74.1109 (1968). In contrast, CATV systems proposing service in markets below top 100 are generally free to proceed, after notice to local stations, without awaiting a hearing. This is subject to the possibility that the Commission may grant a petition from an affected broadcast station for special relief under the waiver rule,—both for relief on the merits to halt or condition the operation of the CATV system, and for ancillary procedural protection, giving petitioner an opportunity to be heard before the CATV system is given authority to proceed. 47 C.F.R. 74.1107(c) (1968). The petitioner must state facts sufficient to show that relief is needed and

---

[5]The Commission has defined the term "distant signal" as a signal "which is extended or received beyond the Grade B contour of that station." 47 C.F.R. 74.1101(i) (1968). The carriage rules require CATV systems to transmit to their subscribers Grade B signals reaching their service area. The chief purpose of the CATV hearing rules is to permit assessment of the need for restrictions on CATV importation of signals not reaching the system's service area at all. The predicted Grade B contour of the Denver signals reaches Colorado Springs, but not Pueblo. Some argument has ensued over whether petitioner Pikes Peak is entitled to object to the importation of the non-distant Denver signals. We think that the record adequately shows that the Denver stations are not in fact generally viewable in Colorado Springs due to transmission problems over the rugged terrain. The Commission has recognized that there may be situations where CATV importation of non-distant signals will affect viewer patterns and threaten substantial audience fractionalization. *Second Report and Order, supra* at 786, n. 69. There would be no dispute and probably no CATV proposal either if Denver stations were already widely viewable in this market, and we see little point in the Commission's extended quibble over this question.

would serve the public interest. The Commission may make its determination of the public interest issues on the pleadings, or it may specify other procedures such as oral argument, evidentiary hearing, or further written submissions as appear appropriate. 47 C.F.R. 74.1109 (1968).

Petitioners do not challenge the Commission's 100 major market distinction and the procedural differences based on it. They carry the burden, therefore, of showing that the Colorado Springs-Pueblo television market, ranked 138th, does not conform to the pattern of below top 100 markets described by the Commission, and of demonstrating that the presumption, reflected in the rules, that importation of Denver signals is in the public interest has been sufficiently negatived by the showing in their papers to require an evidentiary hearing.

In support of their contention that the Colorado Springs-Pueblo market requires an exception from the general CATV rules for markets under the top 100, petitioners sought to show (1) that this market is likely to support an independent UHF station within the reasonably foreseeable future and (2) that the carriage and non-duplication rules providing exclusivity for local network programming will not adequately protect the three existing network-affiliated stations from losses due to CATV.

In support of these two economic arguments, petitioners submitted a report entitled *An Analysis of the Colorado Springs-Pueblo Television Market: Its History, Status and Future,* prepared by Dr. James L. Saunders and Robert L. Coe, of the Center for Research on Broadcast Management and Economics, School of Communications, Ohio University. In rejecting the conclusions of the Coe-Saunders Report, the Commission was not required to reiterate the general findings of its *Second Report* underlying the conclusion that, in general, introduction of CATV serves the public interest in smaller markets. It was called upon to make a considered disposition of the claim that the Coe-Saunders Report warranted an exception to its smaller

market rule or at least raised questions sufficient to require an evidentiary hearing.

The Commission's disposition of the central economic issues here is marred by small and sometimes mistaken criticisms of the Coe-Saunders Report. However, it serves little purpose to remand a case for correction or clarification of subsidiary matters not central to an agency decision when, as here, the decision is accompanied by findings and analyses supported by the record against the background of the *Second Report* and sufficient to show that the result is reasonable and in conformance with the statute and regulations. *Braniff Airways, Inc. v. CAB*, 126 U.S.App.D.C. 399, 379 F.2d 453 (1967). We consider petitioners' contentions seriatim.

1. Potential for UHF Development

Petitioners argue that, contrary to the Commission's negative view of prospects for independent UHF stations in smaller markets, the Colorado Springs-Pueblo market will be able to support an independent UHF channel by 1972, unless CATV service is introduced. We have given special attention to this argument, because if a real possibility of UHF now exists, it will almost surely be foreclosed by CATV for the foreseeable future.[6] The Commission was justified, we think, in doubting UHF development in this market and in concluding that carriage of the Denver independent station and others by CATV was the more promising way to broaden service to the community.

The Commission stated that, despite petitioners' attempted showing of conditions favorable to UHF, there had been no applications for the UHF assignment and no indications that any would be filed. Its judgment was informed by

---

[6] The judgment on potential for UHF development also merits special examination because it appears to be the main point of disagreement between the majority opinion and the dissent of Commissioner Cox.

experience with UHF operations and applications.[7] Moreover, there are significant weaknesses appearing on the face of the Coe-Saunders case for the likelihood of UHF development. The Report states that television revenues of $3,000,000 will be necessary to support an independent station by 1972, but its own prediction of 1972 revenues is only $2,500,000. The Report then concludes that the $500,000 difference is "present" because current television revenue per home in the market is below average and "the Colorado Springs-Pueblo area might well produce more." (Appendix I, Exhibit G, 288). The Report offers no substantial support for this optimistic forecast. It also states that the market stations have had an unusually high expense-revenue ratio, a factor which would seem to make the picture still more dismal. A favorable inference might have been drawn if the Report had set forth facts to provide a basis for predicting that there would be a change in conditions, and that income per TV home would increase or the expense-revenue ratio would decline; but no such facts were offered. There is no basis in the abstract to suppose that conditions in the Colorado Springs-Pueblo market will change. An average is a combination of highs and lows. The fact that a market area has been on the low side of the national average in the past is not of itself a basis for predicting it will be on the high side in the future. If anything, it would seem more reasonable to project that it will stay below average unless there are facts portending a change in conditions.

The Report does observe that a new station itself generates additional revenues, but this prospect would hardly be adequate incentive for investment in a new station under otherwise unfavorable conditions. The Commission did not act unreasonably in rejecting as inadequate a proffer of a prediction of UHF development that was supported by only such speculative contingencies.

[7]The smallest market in which a UHF station competes with three VHF stations is presently Lynchburg-Roanoke, Virginia, a market with more than three times the number of television households in the Colorado Springs-Pueblo market.

2. Economic Injury to Existing VHF Stations

Since a decline in audience portends a decline in advertising revenues, the estimate of the amount of revenue of broadcast stations that will be dried up by CATV depends upon the estimate of the degree of CATV penetration (number of subscribers) and the level of viewer defection to stations brought into the market via CATV. Stated simply, petitioners' argument is that CATV penetration in the Colorado Springs-Pueblo market will be substantial and that the protection from viewer defection afforded to their network programming by the non-duplication rules will not prevent serious economic loss. They allege (a) that audience fragmentation by CATV will result in substantial revenue losses in their market and (b) that they will be forced into competition with the larger Denver stations in procuring independent (syndicated and feature film) programming sold on a market exclusivity basis when the Denver stations command a substantial viewing audience in the Colorado Springs-Pueblo market. They conclude that predicted losses will necessarily result in curtailment of their high-cost local and public affairs programming, contrary to the public interest.

(a) *Projection of losses due to audience fragmentation*

The Commission recognized that the introduction of CATV would have an economic impact on the local stations, but concluded that this would not be sufficient to threaten their viability. This judgment finds support in the record. First, the Coe-Saunders Report shows on its face that the protection afforded in this market to the stations' audiences and revenues by the non-duplication rule is as great or greater than the protection generally contemplated for smaller market stations in the *Second Report*. The Report states that television stations in the Colorado Springs-Pueblo market receive a comparatively high percentage of their revenues from network sources (22% as compared to a general 16.6% average), and that network revenues

are growing at rates above the norm. In addition, spot advertising adjacent to network programs accounts for 23% of Station KRDO's non-network revenues and 33.5% of Station KOAA's non-network revenues. Thus, revenues for these two stations in the range of 40-50% are derived from programming protected by the non-duplication rule.

The Coe-Saunders Report also states that 36.6% of the local stations' revenue is from local advertisers, while the average from this source is 23.7%. Petitioners contend that national and regional advertisers will be able to turn to Denver stations to reach part of the Colorado Springs-Pueblo market if Denver CATV channels attain high ratings there. This may develop in the future, but it would seem unlikely that local advertisers would be willing to pay higher Denver rates for the relatively small portion of the market audience they wish to reach. A substantial portion of local advertising revenues is likely to remain oriented to the local television stations.

In its analysis of the Coe-Saunders Report, the Commission pointed out errors in calculations which overstated the extent of the losses projected for petitioners. For example, Table III, Exhibit H of the Report, showing losses at varying levels of CATV penetration and viewer defection, is based on a market of 90,000 TV homes, the total for the two-county area. However, as the dissenting Commissioner concedes, the CATV systems whose impact is analyzed in the Report will operate only in the core cities of Colorado Springs and Pueblo, containing only about 60,000 TV homes. Retaining the assumption of the Coe-Saunders Report of a minimum of 25% CATV penetration and 30% viewer defection, but making a downward adjustment from 90,000 to 60,000 homes, the calculated loss of some $123,000 would recalculate at approximately $82,000. Other problems in the Coe-Saunders projections make it

likely that even the adjusted figure is a high-pitched estimate of losses due to CATV.[8]

The Commission's conclusion on the economic injury issue is also supported by a different, perhaps an alternative ground. The Commission held that the general increases in television advertising revenues in the market projected in the Coe-Saunders Report itself would be sufficient to protect the viability of the local stations. Exhibit G of that Report states that television revenues in the Colorado Springs-Pueblo market can be expected to increase at the rate of at least $100,000 per year. This forecast is based upon general growth factors such as increases in population, number of TV homes, income per household, and retail sales. (Appendix II, Exhibit G, 282-84.) While these projected increases in market revenues would have to be adjusted for the impact of CATV, including the possibility of lower advertising rates, they certainly cushion against a sharp absolute decline in revenues for the local stations.[9]

---

[8] For example, the Coe-Saunders estimates of viewer defection are based on an analysis of the impact of CATV in the Bakersfield, California television market. As petitioner Pikes Peak Broadcasting Company concedes in its reply brief (at 25), the Bakersfield system imported the signals of three independent Los Angeles stations as well as the network affiliates. The non-duplication rules afford no protection to local stations from competition from independent stations. Here, however, the CATV system proposes to bring in only one Denver independent station, which presages a lower rate of defection in the Colorado Springs-Pueblo market.

In its main brief, Petitioner Pikes Peak estimates a higher minimum loss, basing its projection on 60% CATV penetration instead of the Coe-Saunders estimate of 25%. The support of record for this estimate is a statement that according to a trade periodical, one of Vumore's principals was reported to have said that Vumore anticipated 60% saturation in Colorado Springs in seven years. (Appendix I, 92) This court does not propose to choose among these conflicting forecasts. It suffices to say that some reasonably clear and substantiated estimate of losses was required to meet petitioners' burden under the rules, and we do not find that kind of showing in the papers before us.

[9] The agency was not required to accept the apparent assumption of Commissioner Cox, in dissent, that the introduction of CATV will drai

We think the Commission's conclusion that the stations would remain financially viable is supported in the record and is not lacking in reasoned judgment. There was no need for the Commission to accord an evidentiary hearing to give petitioners an opportunity to develop evidence when the proffer, even if confirmed by testimony in the hearing room, was not sufficient in the Commission's view to establish a need for an exception from its general findings and policy for CATV in smaller markets.

(b) *Problem of competition with Denver stations*

The argument that the Colorado Springs-Pueblo stations will be forced to bid against Denver stations for syndicated programming sold on a market exclusivity basis assumes very substantial shifts in viewing patterns, tending over the long run to merge the Denver and local markets. Petitioners could not be expected to provide detailed factual support for this allegation. At the same time, it is doubtful that this argument could be further substantiated in an evidentiary hearing. We think the Commission could reasonably reserve judgment on a forecast looking so far into the future.

(c) *Reasonableness of Commission's judgment in view of its option to reconsider and provide future protective relief upon a showing of actual injury.*

It is important to emphasize, and perhaps decisive, that the Commission's judgment on all of these economic forecasts is a provisional one, subject to modification if the

---

off all benefit from general increases in market advertising revenues. It seems doubtful that declines in rates for advertising would be so drastic as to exceed significantly any increases in advertising dollars that go into television. Increases in population and television homes would help to stabilize the stations' audiences. It seems likely that local TV advertisers will remain oriented to local media and will not regard other media as fully satisfactory substitutes for television advertising. Assuming local advertising expenditures increase and the supply of air-time remains limited with only three local broadcast stations, there would be mitigation of any sharp reduction in advertising rates.

viability of the existing stations is in fact impaired by CATV. The CATV rules, including the different hearing requirements and burdens allocated to CATV and the stations in major and smaller markets, are intended to accommodate the benefits of CATV and the legitimate claims of local broadcasting to protection for its vital public service function. As the Second Circuit observed in sustaining the Commission's regulation of pre-sunrise radio broadcasting, ". . . we cannot fault the Commission for believing a compromise between these competing claims constitutes the best solution. If experience should show the particular compromise here adopted to be less beneficial than the Commission believes, the road to change is always open." *WBEN, Inc. v. United States*, 396 F.2d 601, 614, *cert. denied*, 393 U.S. 914 (1968).

We think that petitioners have not met the burden of showing a likelihood that their viability will be imperiled, with consequent dilution of public service. Experience may reveal that the protection afforded to smaller market stations by the carriage and non-duplication rules is too little and the burden of showing special injury too great, but it is too soon to say the Commission struck a bad balance. We need only add that the public interest in maintaining free and local television service to both urban and rural viewers is more than sufficient to justify extraordinary remedies should they later be required. CATV operators must recognize, as Vumore's counsel conceded before this court, that they have no vested right to transmit a maximum number of signals to an unlimited number of subscribers if local broadcasting is jeopardized. The Commission's authority over CATV operations extends to whatever is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co., supra*, 392 U.S. at 178. This must include the power to correct false starts and to cut back CATV operations if more experience shows this policy best serves the public interest. If developments in the Colorado Springs-

Pueblo market confirm petitioners' dour predictions, they are free to seek further relief based on a factual showing of injury. *Second Report and Order, supra,* Para. 150 at 786.[10] Cf. *Permian Basin Area Rate Cases,* 390 U.S. 747, 764 and 770-71 (1968).

3. Concentration of Control of Communications Media

Petitioners allege that Vumore, its stockholders and principals, own numerous other CATV systems, microwave systems, and television stations in the country, and urge that the Commission hold a hearing on the issue of concentration of control of communications media. The Commission has the question of CATV cross-ownership under study in a rulemaking proceeding, *Notice of Inquiry in Docket No. 17,371,* 7 F.C.C.2d 853 (1967). We think it was within their discretion to decline to set the matter for earlier consideration in an adjudicatory hearing related to a particular market area. There are now no rules limiting ownership of CATV facilities by persons with other media interests. With program origination by CATV in an early stage of development, the need for rules to preserve diverse ownership of independent voices of opinion has perhaps been less pressing. Of course, the CATV system will increase the number of independent sources of information in the Colorado Springs-Pueblo community. The Commission also observed that Vumore's cross-ownership of media is not in the same market.

We agree with petitioners that the issue of concentration of control is important, and calls for prompt Commission

[10]The Commission stated its position as follows: "As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are our best judgment of what the public interest now calls for. We recognize that they may not perfectly fit every situation, and repeat that should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing." *Second Report and Order, supra* at 786.

action. However, we cannot expect instant regulation of all aspects of this complex and dynamic industry. The Commission should be afforded some time to develop a general policy enforced by rules. It will be able to remedy undue concentration of control if it occurs in the interim by retroactive adjustments, provided they are reasonable. *Niagara Mohawk Power Corp. v. FPC*, 126 U.S.App.D.C. 376, 379 F.2d 153 (1967). CATV systems are on notice that subsequent rules on multiple ownership may affect them. *Midwest Television, Inc. (KFMB-TV)*, 13 F.C.C.2d 478 (1968), Para. 67 at 508. The prospect of future regulation in this new industry is the price of getting underway now.

4. PROSPECT AND IMPACT OF CATV SERVICE OTHER THAN THE RELAY OF THE SIGNALS OF BROADCAST STATIONS: PAY-TV AND PROGRAM ORIGINATION

Petitioners also requested that the Commission consider at a hearing Vumore's plans for program origination and pay-TV, a standard issue in major market CATV proceedings. The Commission observed that pay-TV on a per-program basis is prohibited by the terms of Vumore's franchise from the City of Colorado Springs. This prohibition does not, however, forbid purchase of programs and closed circuit transmission on vacant CATV channels at an additional charge to subscribers.

The development of pay-TV or potential competition from CATV program origination, with or without an identified extra charge, cannot be dismissed as mere speculation in this market. However, consideration of Vumore's plans for service other than the relay of broadcast signals is not essential to a decision to allow the importation of Denver signals. Vumore's venture does not appear to be conditioned upon offering extensive closed-circuit services, and such services pose no immediate threat to the local stations. We think, therefore, that it was within the Commission's discretion to reserve these questions for future rulemaking or petitions for special relief if and when these services take

shape and adversely affect local broadcasting. See *Midwest Television, Inc. (KFMB-TV), supra,* Para. 67 at 508.

Subsequent to the preparation of this opinion and prior to its release, the Commission issued and called to our attention a notice of proposed rule-making that significantly concerns CATV and is addressed, *inter alia,* to such subjects as multiple ownership of CATV systems and CATV potential for program origination and pay-TV. *Notice of Proposed Rulemaking in Docket No. 18,397,* FCC Release No. 68-1176 (December 13, 1968). We cannot anticipate the ultimate form or effect of the proposed rules. However, the Commission's action dramatizes the fact that CATV regulation is in a state of flux and revision and confirms our judgment that it is not reasonable to require the Commission to spell out premature solutions to all problems prior to the authorization of any CATV service in smaller markets.

Putting to one side the possibility that rule changes may have a substantial bearing on the kind of case before us,[11] we hold as to this case that petitioners have not shown that the regulations in effect were arbitrarily applied because the Commission failed to shed new light on the standards for a showing sufficient to require an evidentiary hearing. The standard would perhaps have become sharper had the Commission focused upon clearer rebuttal of petitioners' central allegations. But this court's province in reviewing an agency decision is to see whether "the path which it followed can be discerned." *Colorado Interstate Co. v. FPC,* 324 U.S. 581, 595 (1945). We fairly discern from the opinion as a whole the Commission's view that the conclusions of the Coe-Saunders Report, discounted by its inflated inferences, and judged against the background of the *Second Report,* fall short of establishing a probability that UHF develop-

[11] We have, of course, decided this case on the record and regulations before us. We intimate no opinion on whether or to what extent changes in the rules would affect the rights of the parties in further or different proceedings before the Commission.

ment is likely in the Colorado Springs-Pueblo market and that the viability of local broadcasting will be jeopardized by CATV.

The presumptions reflected in the CATV regulations and procedures established for smaller markets are themselves only predictions, but educated guesses are a necessary part of the Commission's job. "It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience." *American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310, 319, 359 F.2d 624, 633 (*en banc*) (1966), *cert. denied*, 385 U.S. 843 (1966). We are satisfied that the Commission gave petitioners' predictions a hard look. We are assured that if events in Colorado Springs prove the Commission wrong, petitioners will have recourse to the Commission upon a showing of actual injury for such protection as may be appropriate upon a balancing of all interests, including the public's.

Affirmed.

BAZELON, *Chief Judge, concurring in part and dissenting in part:* Two aspects of this case trouble me. The first is the continued failure of the FCC to clarify the standards which govern the decision to hold an evidentiary hearing in a market below the top 100. The second is the cavalier refusal of the FCC to consider the issue of cross ownership on the unelaborated ground that the issue is currently under study by the Commission in a rule-making proceeding.

I

Cedar Rapids Television Co. v. FCC, ___ U.S.App.D.C. ___, 387 F.2d 228 (1967), also involved a refusal by the Commission to hold an evidentiary hearing concerning the importation of a distant signal into a market outside the "Grade A" contour of a television station located in the top 100 markets. Since the petitioners there had failed to produce any documentation to show that UHF develop-

ment might be deterred by the CATV operation or that existing service might be threatened, we affirmed the denial. However, after agreeing with the "Commission . . . that if hearings were required on the sort of 'bare-bone' petition filed here, then hearings would almost always be required," we observed,

> Perhaps the paucity of information explains the Commission's failure to make clear in its memorandum opinion the burden of proof it expects petitioners seeking an evidentiary hearing to meet. Although the record in this case is such as to make it pointless to remand for a fuller explanation, we think it necessary to remind the Commission that particularly when, as here, it embarks into a new area of regulation, there is a special need for a fuller statement of its reasons.

Id. at ___, 387 F.2d at 387.

Several months later, in *Eastern Microwave, Inc.*, 11 F.C.C.2d 146 (1967), the Commission held that the petitioner had failed to bear "the initial burden of establishing the existence of special circumstances which would warrant a hearing." *Id.* at 147. Apparently attempting to meet the strictures of *Cedar Rapids,* the Commission elaborated its reasons:

> [The petitioner] has failed to supply any specifics, by affidavit or otherwise, regarding its financial condition, the impact that the present CATV system has on its operation, the impact that the proposed additional signals would have, or the manner in which the present or proposed CATV operation relates adversely to Brockway's operation to the detriment of the viewing public.

In this case, unlike *Cedar Rapids* and *Eastern Microwave,* the Commission can hardly argue that no documentation was submitted for the petitioners' claims that the proposed CATV operation would reduce the likelihood of an independent UHF station and threaten the viability of existing stations. Instead, the Commission examines the exhaustive *Coe-Saunders* report and other material submitted by the petitioners, criticizes various aspects of it, and concludes (1)

"our analysis of this market indicated no likelihood of UHF activation in at least the near future," and (2) "it does not appear that the potential impact [of the CATV system] would be sufficient to threaten the viability of existing or potential stations." Consequently, the Commission decides that the petitioners have "failed to establish special circumstances which would justify grant of the special relief it has requested."

This refusal to grant "special relief" confounds the separate questions of whether the importation of distant signals should be prohibited and whether the petitioners are entitled to a hearing on that issue. Insofar as the former question is concerned, I would agree that the petitioners have not demonstrated their case. The appearance of an independent UHF station does appear speculative; the probability of such economic harm as would threaten the viability of the present VHF station seems low.

But surely this cannot be the standard which must also be met for a hearing. To impose a requirement that the petitioners must prove by a preponderance of the evidence the case for non-importation of distant signals in order to be entitled to the evidentiary hearing which they seek in order to demonstrate the case against importation of signals would be a bizarre and circumlocutous way of announcing there never shall be any hearings in these markets.

Of course, the decisions of the Commission in this area suggest that this may indeed be the intended message—with the caveat that the FCC retains the right to grant a hearing when it pleases and for whatever unannounced reasons it pleases. In denying a hearing in this case, the Commission contributed only this analysis of the standards which determine the need for a hearing:

> [A]bsent a special showing made pursuant to Section 74.1109 of the Rules, there is no need for prior evidentiary hearing before CATV service may be instituted in below top-100 markets.

This case, like the previous cases in which the FCC has denied a hearing in such cases, gives little or no suggestion

what constitutes a "special showing." Nor do those cases in which the Commission has granted a hearing. *Taft Broadcasting Company*, 5 F.C.C.2d 746 (1966), involved the Lexington, Kentucky, market, which ranks 141st, three notches lower than the Colorado Springs-Pueblo market. The Commission held:

> In view of the nature of the Lexington market, its present UHF activity, and the facts set forth in the pleadings, a substantial question is raised as to the impact of the CATV systems upon UHF development. We will explore this question in a hearing.

Id. at 747.

Aside from a pending application for an educational UHF station in Lexington at the time of the decision, there seems little to distinguish that case from the present one. Certainly a "substantial question" has been raised here. And in *Taft Broadcasting*, the Commission seemed content with "the facts set forth in the pleadings"—a strange departure from the disdain with which it has viewed pleading allegations unsupported by evidentiary documentation in other cases.

United Transmission, Inc., 6 F.C.C.2d 786 (1967), involved several communities in Kansas, none of which were in a top-100 market. Two existing stations alleged that the proposed CATV systems would threaten their viability. The Commission decided that a hearing was necessary:

> As is frequently the case in economic impact cases, KSN's underlying assumptions leave lingering doubts, such as: Whether only the "net KCKT grade B area" is the proper measure of KCKT's circulation or profitability; whether KSN's accounting allocations are correct; and whether—in this market—KSN's estimates of the cost of CATV competition are realistic, particularly since KCKT is a semisatellite. But whatever our final decision, KSN's allegations and supporting documentation evoke sufficient concern to require evidentiary hearing. . . .

Id. at 787.

Of course, in this case it was just such "lingering doubts" concerning the validity of the petitioners accounting allocations and cost estimates which the Commission advanced to justify the refusal of relief.

The majority opinion of this Court, in examining the potential for UHF development in the Colorado Springs-Pueblo market, seems as uninterested as the Commission in treating separately the merits of the petitioners' case and the need for a hearing. The same is true concerning the issue of economic injury to existing VHF stations, except that the majority makes the alternative argument that no hearing was necessary since the allegations of the petitioners, even if true, were not sufficient to demonstrate a threat to their viability. The majority reaches this result by (correctly) recalculating the *minimum* estimated loss from CATV competition downward from $123,000 to $82,000 and suggesting that the estimated $100,000 annual increase in advertising revenue in the market would cover this loss easily.

But the *Coe-Saunders* report submitted by the petitioners provided a variety of loss estimates. While the minimum was $123,000, the maximum was $687,000. Adjusting this latter figure downward to correct for the error in the report concerning the number of households affected produces a maximum loss estimate of $458,000. Since the estimated growth in advertising revenues would hardly match losses of this magnitude, it is hardly accurate to argue that the petitioners' claims did not, even if believed, demonstrate a threat to their viability.

Whenever a hearing is denied, the Commission points out to this Court the cost and delay of hearings and the number of petitions with which it must deal. I sympathize with its plight. I also sympathize, however, with the petitioners in this and other cases who take the Commission at its repeated word that there are "special circumstances" that will justify a hearing. It does not seem impossible to demand of the FCC that it tell present and potential peti-

tioners, as well as this Court, just what those "special circumstances" might be.

An evidentiary hearing involves cost and delay. But so does a protracted administrative proceedings and appeal to decide whether a hearing is necessary. The FCC might well reduce its often-complained of workload by announcing with greater particularity the standards which govern the decision to grant a hearing, and thereby perhaps reducing the number of cases such as this where both the petitioners and the Commission have devoted considerable time and effort to the question of whether a hearing is necessary.

Normally, I would vote for a remand in this case in order for the FCC to answer such questions as the burden of production a petitioner must bear to justify a hearing and the sort of information relevant in meeting that burden. However, the notice of proposed rulemaking issued by the Commission after oral argument in this case indicates that substantially different standards are contemplated for the importation of distant signals into below top-100 markets. *Notice of Proposed Rulemaking in Docket No. 18,397*, FCC Release No. 68-1176, Paras. 55-58 (December 13, 1968). Since the CATV systems involved in this case have not yet begun operation because of the July 3, 1968, order of this Court staying the authorization granted by the Commission, they will be subject to these new rules. *Id.* at Para. 59. Consequently, I can see no utility to a remand in this case for a clarification of hearing standards under the old rules.

II

The Commission refused to consider the issue of multiple ownership of CATV systems in this proceeding because "the Commission retains adequate authority to deal with the question should action later appear desirable." The majority opinion accepts this representation, noting that the proposed rulemaking proceeding referred to in the preceding paragraph will also deal with the issue of multiple ownership.

I agree with the majority that "it is not reasonable to require the Commission to spell out premature solutions to all problems prior to the authorization of any CATV service in smaller markets." But, on the other hand, neither is it reasonable to disregard completely whether any new rules dealing with multiple ownership can or will in fact be applied to the market involved in this case.

In the section of its notice of proposed rulemaking dealing with multiple and cross ownership, the Commission states, "We stress that no grandfathering is contemplated, although consideration will be given to the question of affording an appropriate period within which compliance . . . is to be achieved." *Id.* at Para. 23.

My enthusiasm for this declaration of good intentions is tempered by the fact that the Commission has stated flatly in those sections of its notice dealing with importation of signals into both top-100 and below top-100 markets that any new rules will be applicable to CATV systems not yet in operation. *Id.* at Paras. 52, 59. If such explicitness is possible in those areas, why not in the areas of cross and multiple ownership?

The specter of grandfathering is hardly illusory. In the area of signal importation, the notice of proposed rule-making does provide that CATV systems already in operation will not be affected by the new rules "in view of the general impracticability or rolling back established service." *Id.; see also, Second Report and Order,* 2 F.C.C.2d 725, 782 (1966).

Perhaps diversification of ownership is more easily ordered than a rollback of established service. *But cf. Community Broadcasting Co. v. FCC;* 107 U.S.App.D.C. 95, 101, 274 F.2d 753, 759 (1960). But our experience with the problem of grandfathering in the communications industry has been such that I am unwilling to accept blithely the Commission's assurances of good intentions. Since there is no explicit provision against grandfathering in the part of the notice of proposed rule-making dealing with concentra-

tion of media ownership. I would remand this case to the Commission for a more complete statement of precisely the "adequate authority" it retains to deal with the problem in the Colorado Springs-Pueblo market. *Cf. United Transmission, Inc.*, 10 F.C.C. 118, 119 (1967).

APPENDIX B

COMMUNICATIONS ACT OF 1934, AS AMENDED (47 U.S.C. SEC, 151 *ET. SEQ.*)

§ 307. Licenses; allocation of facilities; terms; renewals

* * * * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * *

§ 309. Application for license – Considerations in granting application.

* * * * *

Petition to deny application; time; contents; reply; findings

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of

public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other maters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

* * * * *

Hearings; intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission

for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

APPENDIX C

RULES 74.1105, 74.1107 and 74.1109 of the FEDERAL COMMUNICATIONS COMMISSION (47 CFR §§ 74.1105, 74.1107, 74.1109)

"§ 74.1105 Notification prior to the commencement of new service. – (a) No CATV system shall commence operations in a community or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of the station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to entend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served

upon the superintendents of schools in the community and county in which the system will operate and the local, area and state educational television agencies, if any.

"(b) The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence.

"(c) Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service which is challenged in the petition shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; provided, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thrity (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107.

"(d) The provisions of this section do not apply to any signals which were being supplied to subscribers in the community of the CATV system on March 17, 1966, unless it is proposed to extend lines into another community.

"**§ 74.1107** Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures. – (a) No CATV system operating is a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a

television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

"(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, the date on which copies of the notifications required by §74.1105 of this chapter were filed with the Commission, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such response or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

"(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall

extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

"(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers in a community on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area or any extension into another community does come within the provisions of paragraphs (a) and (b) of this section: and provided further, that no CATV system located in a community in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend such service to new geographical areas within the same community where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, paragraphs 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas in the community. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature

of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

"(e) Within sixty (60) days of issuance of a request filed pursuant to paragraph (a) of this section, interested parties seeking simultaneous consideration with such request must file appropriate requests for any other CATV system in the same television market. All requests for CATV systems in a given market timely filed with respect to the first request will be processed and considered simultaneously. Later filed requests for the particular market will be subject to chronological processing and may not be considered in the same proceeding as the earlier requests.

"§ **74.1109** Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes. – (a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

"(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant or other interested person who may be directly affected if the relief requested in the petition should be granted.

"(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

"(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

"(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

"(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply coments.

"(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of

the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

"(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such requests for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

"(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures."